FILED
FEB 28 1991
OFFICE OF THE CLERK

No. 90-1168

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TOWN OF CONCORD, MASSACHUSETTS and
TOWN OF WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

REPLY BRIEF OF PETITIONERS

CHARLES F. WHEATLEY, JR.
34 Defense Street
Annapolis, MD 21401
(301) 266-7524

February 27, 1991

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
CONCLUSION	10

TABLE OF AUTHORITIES

CASES

Cities of Anaheim, 1990-2 Trade Cas. (CCH) ¶ 69,246 (C.D. Cal. 1990) 7, 9
City of Groton v. *Connecticut Light & Power*, 662 F.2d 921 (2d Cir. 1981) 6
City of Kirkwood v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) 3, 6, 8
City of Mishawaka v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981) 3, 4, 5, 9
MCI Communications Corp. v. *AT & T Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) 7
Mourning v. *Family Publications Serv., Inc.*, 411 U.S. 356 (1973) 7
Piper Aircraft Co. v. *Reyno*, 454 U.S. 235 (1981) .. 6
Spevak v. *Klein*, 385 U.S. 511 (1967) 7
State of Illinois v. *Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990) 8

ADMINISTRATIVE MATERIALS

Boston Edison Co., 54 FERC ¶ 61,105 (Feb. 5, 1981) 10

REPLY BRIEF OF PETITIONERS

Aside from its efforts to relitigate factual issues resolved against it by the jury below,[1] Boston Edison ("Edison") does no more than demonstrate what is evident from the text of the court of appeals' decision: that the First Circuit made a half-hearted attempt to shield from further review a landmark ruling on an important issue of antitrust law. The importance of this issue—*i.e.*, whether a system of "dual" federal and state regulation shields a utility from antitrust liability for a price squeeze—is demonstrated not only in the petition for certiorari, but also in the briefs *amici curiae* of the American Public Power Association and the National Rural Electric Cooperative Association ("APPA/NRECA"), the National Association of Gas Consumers ("NAGC"), and the cities of Anaheim, Riverside, Banning, Colton and Azusa, California ("Cities").

Edison's attempt to escape the clear conflict between the decision below and decisions of the Seventh and Eighth Circuits rests entirely upon specious semantic arguments and misinterpretations of those decisions. Edison's principal strategy on certiorari—its reliance on the court of appeals' alternative holding with respect to Edison's monopoly power—is similarly misguided. In addition to its erroneous assumption that petitioners bear the burden

[1] For example, Edison's contention that the Towns suffered no injury as a result of Edison's price squeeze (Opp. 12-13) was rejected by the jury and the district court. See Pet. App. 45a-46a. As Edison itself admits (Opp. 5 n.7), the court of appeals did not overturn the findings of the district court on this issue. In fact, the evidence presented at trial showed that, during the period from 1984 until the trial below, Edison's price squeeze forced the Towns to charge higher rates to their large commercial customers than Edison did. J.A. 844-47, 864-65, 918-30, 1079-80, 3394. As a result, the Towns lost sales (J.A. 1241-44, 1785-86, 3488) and millions of dollars in revenue (J.A. 1005-06, 1008-10, 1064-65, 1075-80). Also, employee wages had to be kept down, reducing the ability of the Towns to compete in the labor market. J.A. 1005-06.

of demonstrating that *both* questions presented are independently worthy of review, Edison's argument overlooks two critical points: (1) the court of appeals' analysis of monopoly power rests upon the same erroneous premises as the court's principal holding; and (2) that analysis presents an important legal issue that is, in fact, indedently worthy of this Court's review.

1. Edison's first and primary response to the Towns' analysis of the court of appeals' dual regulation holding is to quibble with petitioners' characterization of that holding. In particular, Edison disputes the Towns' statement that the decision below created an antitrust "immunity" from price-squeeze claims. Respondent's Brief in Opposition ("Opp.") 6, 8. To be sure, the court of appeals was careful to point out that it was not giving utilities subject to dual regulation a "*blanket* immunity from the antitrust laws" (Pet. App. 8a; emphasis added) and therefore did not hold that "the antitrust laws do not apply" to such utilities (Pet. App. 11a). But the court of appeals did not dispute that the effect of its holding was to create an immunity *from price squeeze claims.* To hold as a general matter that dual regulation prevents a price squeeze from being exclusionary (Pet. App. 11a-12a, 18a-19a, 23a) in effect creates a limited immunity for a utility subject to dual regulation.

In short, whether the court's holding is labeled a "defense" or an "immunity" makes no practical or analytical difference. The point is that conduct which clearly *would* be a violation of the antitrust laws under standard antitrust principles is shielded from antitrust liability by the fact of dual regulation.

But no matter how the ruling is characterized, its breadth and importance cannot be doubted. Edison's brief nevertheless attempts to convey the false impression that the decision of the court of appeals was somehow dependent upon—and limited to—"the factual record before it." Opp. 5; see also *id.* at 8, 11, 13. This contention not only

ignores the procedural posture of this case,[2] but also distorts the court of appeals' opinion. First, the opinion began by stating the issue before the court in extremely broad terms: "The chief question raised by this appeal is whether a pricing practice known as a price squeeze violates the antitrust laws when it takes place in a fully regulated industry." Pet. App. 2a. Without acknowledging that this "chief question" was first raised on appeal by the panel itself rather than by Edison (see Pet. 9-10; Pet. App. 47a), the court then summarized its holding as follows: "our analysis of the likely effects of a price squeeze in a fully regulated industry leads us to conclude that the answer is no." Pet. App. 3a. Second, the "analysis" of this issue performed in Section II of the court's opinion is a lengthy, law review-style discussion of economics literature, antitrust treatises, and case law. It contains no analysis of the record before the court.[3]

Edison next makes a weak attempt to escape petitioners' demonstration—and the First Circuit's own admission—that the decision below conflicts with the Seventh Circuit's decision in *City of Mishawaka* v. *American Elec. Power Co.*, 616 F.2d 976 (7th Cir. 1980) (*"Mishawaka"*), *cert. denied*, 449 U.S. 1096 (1981), and the Eighth Circuit's decision in *City of Kirkwood* v. *Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982) (*"Kirkwood"*), *cert. de-*

---

[2] Edison's reliance upon the record in this case is a bit odd given that Edison lost before the jury, whose findings were upheld by the district court as supported fully by the record. It was only the court of appeals' *legal* holdings that permitted Edison to escape liability under the Sherman Act.

[3] Edison nonetheless contends that the court of appeals' holding on the dual regulation issue is "a limited one" (Opp. 8) apparently because the court "left open the possibility" of a successful price squeeze claim "on different facts" (*id.* at 5). To be sure, the court of appeals stated that it was "leaving cases involving *exceptional circumstances* for another day." Pet. App. 25a (emphasis added). But an undefined exception for "exceptional circumstances" does not diminish the gap in the antitrust laws created by the court of appeals' holding.

nied, 459 U.S. 1170 (1983). See Pet. 12-14. With respect to *Mishawaka*, Edison admits that the Seventh Circuit "uph[e]ld a judgment . . . that an electric utility's rate filings created a price squeeze" (Opp. 10), and further held that this price squeeze constituted a "Section 2 violation" (*id.*). See also 616 F.2d at 983-84 (dual regulatory scheme "offers an obvious, ready made *illegal* opportunity [to engage in a price squeeze] with a legitimate gloss") (emphasis added). Nor does Edison dispute that the Seventh Circuit expressly rejected the "dual regulation" analysis adopted by the court below: after noting that "we are considering an industry subject to both federal and state regulation," the Seventh Circuit held that "that circumstance [does not] justif[y] an antitrust exemption." 616 F.2d at 985.

Edison's incredible suggestion that *Mishawaka* is nonetheless in "agreement with the Court of Appeals here" (Opp. 10-11) is based solely upon a passage in which the Seventh Circuit rejected an argument by the defendant that the court should "consider each separate aspect of its conduct separately and in a vacuum." 616 F.2d at 986. The Seventh Circuit stated that, if it had done this, "we might agree with the utility that no one aspect standing alone is illegal." *Id.* Putting aside Edison's blatantly false statement that in this case the price squeeze is the "sole conduct alleged to be exclusionary" (Opp. 10),[4] the Seventh Circuit's statement in no way diminishes the conflict between *Mishawaka* and the decision below. The dispositive point is that the judgment against the defendants in that case was affirmed, at least in substantial part, on the basis of the plaintiffs' price squeeze claim. See 616 F.2d at 978, 983-85. Had the Seventh Circuit ap-

---

[4] As Edison itself recognizes elsewhere (Opp. 10-11 n.13), the Towns alleged—and demonstrated at trial—that Edison had used its undisputed monopoly control over the transmission of electricity to put the Towns at a competitive disadvantage. See Pet. 3-6, 13 n.3. Thus, even if *Mishawaka* were read to require evidence of anticompetitive activity in addition to a price squeeze, that requirement was plainly satisfied here.

plied the "dual regulation" rule now adopted by the First Circuit in this case, it could not have simply affirmed the decision of the district court. Neither the decision below nor Edison's brief disputes this fundamental point.[5]

Edison's argument that the decision below does not conflict with the Eighth Circuit's decision in *Kirkwood* is equally erroneous. Edison does not dispute the district court's statement below that the Eighth Circuit in *Kirkwood* had squarely rejected a legal challenge to a price squeeze claim that was "identical" to the claim asserted by Edison and ultimately adopted by the First Circuit. Pet. App. 42a-43a. Nor does Edison dispute the court of appeals' statement below that its "reasoning and analysis differ[] significantly from that in" *Kirkwood*, among other decisions. Pet. App. 24a. And the dispositive point —also not disputed by Edison—is that the result in *Kirkwood* would have been different if the Eighth Circuit had applied the rule articulated by the court below: the Eighth Circuit's rejection of the dual regulation defense (or immunity) in that case was plainly necessary to the judgment reversing the district court's grant of summary judgment for the utility defendant. See Pet. 14 n.4.

Edison's sole argument with respect to *Kirkwood* is that, according to Edison, *Kirkwood* was decided on immunity grounds rather than on exclusionary conduct grounds. See Opp. 9-10. However, as discussed above (*supra* p. 2), this distinction is purely semantic. In-

---

[5] In any event, Edison ignores the Seventh Circuit's own explanation of the statement on which Edison relies. Immediately after the passage cited in the text, the Seventh Circuit stated: "We have recognized previously that '[t]here are kinds of acts which would be lawful in the absence of monopoly but, because of their tendency to foreclose competitors from access to markets or customers or some other inherently anticompetitive tendency, are unlawful under § 2 if done by a monopolist . . .'" 616 F.2d at 986. Thus, the court's statement that "no one aspect standing alone is illegal" was merely a restatement of the unremarkable principle that monopoly power can make otherwise benign behavior unlawful.

deed, the Eighth Circuit recognized the broad scope of its holding when it stated that every court that had previously addressed the issue "came to the same conclusion we do, namely that a municipality's price-squeeze claim is cognizable under the antitrust laws" when asserted against a utility subject to dual regulation. 671 F.2d at 1177 n.8 (citing, *inter alia*, *Mishawaka* and *Groton*). By contrast, the First Circuit clearly held that ordinarily a price squeeze by such a utility is not a violation of Section 2, and that a price-squeeze claim by a municipality is therefore *not* "cognizable under the antitrust laws." The conflict between *Kirkwood* and the decision below could hardly be more plain.[6]

In sum, notwithstanding Edison's revisionist arguments, the primary holding below is a landmark antitrust ruling that squarely conflicts with both *Mishawaka* and *Kirkwood*. It demands review by this Court.

2. Ironically, the great bulk of Edison's brief is devoted to an issue that was only an afterthought in the court of appeals' decision—the question of Edison's monopoly power. Edison apparently believes that the court of appeals' holding on this point is a barrier to this Court's granting certiorari on the issue presented by the court of appeals' principal holding. See Opp. 6. Edison is wrong. As a general matter, the existence of an alternative holding *on a federal-law ground* is no barrier to review of another holding that is otherwise worthy of review.[7] Hence, the Towns do not bear the burden of dem-

---

[6] Edison's misreading of *City of Groton* is equally clear. Not only did the Second Circuit indicate that the alleged price squeeze (if proven) was exclusionary conduct, it even adopted a rebuttable presumption that a discrepancy between wholesale and retail rates always has an anticompetitive effect. *City of Groton* v. *Connecticut Light & Power*, 662 F.2d 921, 934-35 (2d Cir. 1981).

[7] See, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981) ("An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case.") (citations

onstrating that the second issue presented in their petition is independently worthy of review in order for this Court to grant certiorari on the first issue. But even if the Towns ordinarily would bear this burden, the court of appeals's monopoly power holding presents no barrier to review of the dual regulation immunity holding for two additional reasons.

First, as demonstrated in the petition (Pet. 19 n.7) and the brief for *amici* APPA and NRECA (APPA/NRECA 9, 15), the First Circuit's decision on the question of monopoly power is not a separate and independent basis for the decision below. Rather, the opinion rests on the same flawed notion that "regulatory rules, constraints, and practices" (Pet. App. 12a) effectively prevent a transmission monopolist such as Edison from exercising market power. For example, in dismissing the Towns' contention that the five-year notice provision (coupled with the availability of "adverse impact" charges for its violation) in Edison's wheeling tariff effectively gave Edison monopoly power at the wholesale level, the First Circuit noted that the Towns "remain free to challenge before FERC any unreasonably high charge that Edison might try to assess under this provision." Pet. App. 29a.

The court of appeals' assumption about the effectiveness of FERC regulation is contrary to the views expressed to this Court by the Department of Justice in *Kirkwood* (See Pet. 15-17), as well as the analyses of many other federal courts.[8] Moreover, as demonstrated

---

omitted); *Mourning* v. *Family Publications Serv., Inc.*, 411 U.S. 356 (1973) (granting review of authority of Federal Reserve to issue regulation; reversing on that issue as well as alternative holding of court below); *Spevak* v. *Klein*, 385 U.S. 511 (1967) (reversing lower court on both granted ground and alternative holding).

[8] See *MCI Communications Corp.* v. *AT & T Co.*, 708 F.2d 1081, 1107 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983) ("[I]n assessing the existence of monopoly power. . . . th[e] analysis must focus directly on the ability of the regulated company to control prices or exclude competition—an assessment which, in turn, requires close scrutiny of the regulatory scheme in question"); *Cities of Anaheim*,

by APPA and NRECA, the First Circuit's assumption is contrary to FERC's own detailed consideration of this precise question (APPA/NRECA 9 n.4) as well as FERC's limited view of its authority over wheeling arrangements (*id.* at 9-11). Because the court of appeals' monopoly power holding suffers from the same fundamental misconception about the effectiveness of regulation as the court's dual regulation holding, the former clearly cannot shield the latter from further review.

Second, as demonstrated in the petition, the court of appeals' monopoly power holding presents a clean legal issue that is itself important and worthy of review: whether a monopoly at the wholesale level is not only sufficient, but also *necessary*, to satisfy the monopoly power requirement in a case involving a price squeeze. See Pet. 9, 11, 17-22. Edison does not dispute that it possesses a monopoly at both the retail and the transmission levels. Pet. 9, 11. Edison also agrees with petitioners that, in the decision below, the First Circuit has now joined the Third Circuit in squarely holding that a wholesale monopoly is necessary in a price squeeze case. Opp. 6.[9]

1990-2 Trade Cas. (CCH) ¶ 69,246 at 64,900 (C.D. Cal. 1990) ("The presence of regulation limits, but does not wholly negate, Edison's ability to control prices and to obtain monopoly profits. 'Insensitivities, gaps or delays' in the system of regulation may enable the regulated monopolist to obtain more than competitive returns and to improperly affect actual or potential competition in a related market"); *State of Illinois* v. *Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826, 904 (C.D. Ill. 1990) (a reviewing court must consider "the interrelationship between the particular anticompetitive practices at issue and the regulatory scheme under which the defendant operates, to determine whether the regulations effectively counter such abuses").

[9] Edison incorrectly contends that *Kirkwood* reached a similar result. In that case, the only allegation with respect to relevant market was that the utility had "a regional monopoly over the wholesale supply of electric power." 671 F.2d at 1176. Thus, the Eighth Circuit's decision in *Kirkwood* had no occasion even to consider whether a retail or transmission monopoly would be sufficient to satisfy the monopoly power requirement of a Section 2

Edison is incorrect, however, in claiming that there is no conflict on this issue. Edison fails to even acknowledge, much less address, the district court's express holding in *Mishawaka* that a retail monopoly is sufficient. See Pet. 17-18. Edison also fails to acknowledge or address the Fourth Circuit's express affirmance of *all* of the district court's findings, "findings with which," in the Seventh Circuit's words, "we are in accord." 616 F.2d at 985; see Pet. 18.[10] As a result of this express affirmance, the rule articulated by the district court in *Mishawaka* is now the law of the Seventh Circuit, and it is plainly in conflict with the rule which now prevails in the First and Third Circuits. See *Cities of Anaheim* v. *Southern California Edison Co.*, 1990-2 Trade Cases (CCH) ¶ 69,246 at 64,899-900 (C.D. Cal. 1990) (contrasting *Mishawaka* and *Lansdale*).

Perhaps most remarkably, Edison does not dispute that its transmission monopoly satisfies the monopoly power requirement of Section 2 as a matter of law because (1) Edison's transmission charges are included in the "wholesale" rates filed with the FERC, and therefore (2) any manipulation of Edison's wholesale rates for exclusionary purposes represents an abuse of Edison's transmission monopoly. See Pet. 20. Nor does Edison dispute that the court below erred in announcing the sweeping rule that a utility's willingness to wheel power, in combination with FERC's authority over wheeling agreements, requires that the relevant market include all sources of electricity that can be wheeled to the plaintiff. For reasons explained in the petition (Pet. 18-19 n.7) and in the brief of *amici* APPA and NRECA (APPA/NRECA 7-15), this holding is erroneous, enormously important, and at odds with deciisons of the Second, Third and Seventh Circuits.

---

claim. The footnote cited by Edison (*id.* n.4) does not purport to resolve this issue.

[10] Contrary to Edison's contention (Opp. 7), none of the Seventh Circuit statements cited by Edison remotely suggests that a retail monopoly is insufficient.

3. Finally, Edison's assertion that "[t]he issues asserted in the petition are not of widespread importance" (Opp. 13) rests upon the same erroneous assumptions about the efficacy of FERC regulation that have been repeatedly rejected by the Department of Justice, other lower courts, and the FERC itself. See *supra* 7-8. As the brief of *amici* APPA and NRECA makes clear, the decision below will substantially increase the rates paid by millions of customers of the 2000 municipal utilities and rural electric cooperatives that purchase their electricity from investor-owned utilities. And, as demonstrated by the brief of *amici* NAGC, it will have the same effect on customers of over 200 municipal natural gas distribution systems.

Indeed, the likely nationwide effects of the decision below (outside the Seventh and Eighth Circuits) are dramatically illustrated by Edison's own decision, when the ink was barely dry on the First Circuit's opinion, to increase the Towns' wholesale rates by a whopping 29 percent. Pet. 11-12, 22; see *Boston Edison Co.*, 54 FERC ¶ 61,105 (Feb. 5, 1991). Edison finds it "puzzling" (Opp. 3 n.4) that the Towns would mention this incredible abuse of Edison's new-found immunity from the antitrust laws, but it is not puzzling to the Towns why Edison would not "comment on the accuracy of" the Towns' submission. Edison's remarkable filing—which is a matter of public record—speaks for itself. It provides an additional, compelling reason for this Court to review the decision below.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
34 Defense Street
Annapolis, MD 21401
(301) 266-7524

February 27, 1991